

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

BEN EZRA, WEINSTEIN AND COMPANY, INC.

Plaintiff,

v.

No. CIV 97-0485LH

AMERICA ONLINE, INC.,

Defendant.

**DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION
FOR LEAVE TO CONDUCT LIMITED DISCOVERY RELATING TO PLAINTIFF'S
SECOND MOTION TO DISQUALIFY DEFENDANT'S COUNSEL**

Defendant America Online, Inc. ("AOL") respectfully submits this opposition to Plaintiff Ben Ezra, Weinstein and Company, Inc.'s ("BEW") motion for leave to conduct discovery in connection with its attempt to disqualify AOL's local counsel, Eaves, Bardacke & Baugh, P.A. ("EB&B") and to impute that alleged disqualification, as well as the alleged disqualification of AOL's original local counsel Browning & Peifer, P.A. ("B&P"), to all AOL in-house lawyers and its national counsel Wilmer, Cutler & Pickering ("WC&P"). As discussed in AOL's Opposition to BEW's Motion to Disqualify ("Disqualification Opposition"), even if all of BEW's allegations were accepted as true, there would still be no basis for disqualifying EB&B, WC&P or AOL's inside counsel. Accordingly, the discovery that BEW now seeks is totally unnecessary, and permitting BEW to engage in it would only add to the needless burden its disqualification motions have already caused to AOL and to this Court. Thus, BEW's motion should be denied.

BEW's request to conduct discovery with regard to B&P is clearly unwarranted because B&P has already voluntarily withdrawn from this case. Thus, the question whether B&P was disqualified is moot. The only reason B&P's alleged disqualification is even arguably relevant is BEW's assertion that any conflict on the part of B&P must be imputed to all of AOL's in-house lawyers and to WC&P. AOL's Disqualification Opposition establishes that such imputation is unwarranted even assuming -- contrary to fact -- that B&P had a conflict of interest when it briefly represented AOL. Accordingly, BEW should not be given leave to conduct discovery with respect to B&P.

As for EB&B, AOL's Disqualification Opposition demonstrates that, even accepting BEW's allegations as true, BEW has failed to meet its burden of showing that EB&B should be disqualified. Moreover, EB&B has no documents responsive to BEW's proposed subpoena. (Ex. 1, Pl. Motion to Conduct Discovery.) Furthermore, BEW could learn nothing more of possible relevance from taking its proposed deposition of Paul Bardacke, who has already said in a sworn affidavit that he has absolutely no recollection of ever speaking with anyone associated with BEW. Accordingly, granting BEW leave to conduct discovery would simply waste the time and resources of all parties.^{1/}

^{1/} If this Court finds it necessary to resolve the factual dispute between the parties concerning whether Mr. Bardacke of EB&B had a conversation with Mr. Ben Ezra of BEW in which confidential information about BEW was revealed to Mr. Bardacke, AOL would not be opposed to BEW having Mr. Bardacke submit to a brief deposition on this limited issue as long as AOL would also have leave to take Mr. Ben Ezra's deposition on the same subject.

Thus, this Court should reject BEW's motion for leave to conduct discovery in connection with its motion to disqualify AOL's counsel.^{2/}

Respectfully submitted,

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June 24, 1997

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^{2/} To the extent that the Court grants BEW leave, however, AOL respectfully requests that it also be given leave to conduct discovery of a similar scope, including taking the depositions of BEW's principals, Mr. Ben Ezra and Mr. Weinstein.

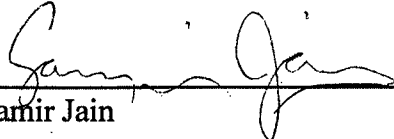
I hereby certify that a copy of the foregoing Defendant's Opposition to Plaintiff's Motion for Leave to Conduct Limited Discovery Relating to Plaintiff's Second Motion to Disqualify Defendant's Counsel was served on June 24, 1997, on the following counsel by facsimile, Federal Express overnight delivery, and first-class mail, postage pre-paid

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and on the following counsel by facsimile and by first-class mail, postage pre-paid

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